NO. 13245

In the United States Court of Appeals for the Ninth Circuit

WESTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

BRIEF FOR RESPONDENT

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CITATIONS

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BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board (hereafter called Board) to issue the order under review rests on sections 2, 205, and 401 of the Civil Aeronautics Act of 1938 (52 Stat. 993, as amended, 49 U.S.C. 401 *et seq.*) and was invoked by various applications filed and orders issued in a consolidated proceeding before the Board, known as the *Reopened Additional California-Nevada Service Case,* Dockets Nos. 2019 *et al.* The jurisdiction of this Court to review such order rests on section 1006 of the Civil Aeronautics Act (52 Stat. 1024, 49 U.S.C. 646) and was invoked by a petition for review filed by Western Air Lines, Inc. (hereinafter called Western) on January 28, 1952.

COUNTER STATEMENT OF THE CASE

Nature of the Case

Petitioner Western herein seeks review of Board Order Serial No. E-6040, dated January 17, 1952, which provided, among other things,[1] that (1) a temporary certificate of public convenience and necessity should be issued to intervener Bonanza Air Lines, Inc. (hereinafter called Bonanza) authorizing local air service between Los Angeles, San Diego and Phoenix via various intermediate points, including El Centro and Yuma, and (2) that Western's existing authority to serve El Centro and Yuma should be suspended up to and including December 31, 1952, the expiration date of Bonanza's temporary certificate.[2]

Petitioner sought a stay of the Board's order pending review. On February 18, 1952, this Court entered an order staying the Board's order

> pending a determination by the Court of the legal issue of whether respondent had statutory power, after notice and hearing, to suspend petitioner's authority to serve El Centro, California and

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[1] The order also provided for the suspension of the authorization of Frontier Airlines, Inc. to operate between Yuma and Phoenix, an action not here under review.

[2] The order also provided that if pursuant to section 9(b) of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. 1008), Bonanza's authority is extended beyond such date by the filing of a timely application for renewal, the suspension of Western's authority will continue until disposition of Bonanza's application. Bonanza is a local air service carrier with a route running between Reno, Nevada, and Phoenix. For a map of the air routes involved, see Western's brief preceding p. 1.

> Yuma, Arizona upon finding that the public convenience and necessity no longer required service to such points by petitioner but rather required service by the intervener.

The Court directed that the parties file briefs directed solely to the legal issue thus framed. Accordingly, the sufficiency of the evidence to support the Board's findings is not in issue. We believe, however, that it will be helpful to the Court to describe the background of the Board's proceedings in this case and the factual setting which gave rise to the order which is challenged here.[3]

The Procedings Before the Board

The order under review was issued in a consolidated proceeding involving the determination of the local air service needs of the Los Angeles-San Diego-Phoenix area and the route pattern best adapted to meet those needs, a problem which had been before the Board for some time in various prior proceedings.[4] The consolidated proceeding involved (1) proceedings under an order of the Board directing Western to show cause why its service at San Bernardino, Palm Springs, El Centro and Yuma should not be suspended, and direct-

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[3] Western's Statement (Br. 2-12) is largely devoted to a historical discussion of the development of the air industry generally and of feeder carriers in particular.

[4] The history of this previous consideration is set forth at pages 1-3 of the Appendix to the Board's opinion in the *Reopened Additional California-Nevada Service Case,* (Pet. Appendix 22-26).

ing Arizona Airways, Inc.[5] to show cause why its authorization to provide service between Phoenix and Yuma should not be suspended; and (2) consideration of applications by Bonanza, Southwest, and Western for certificates to provide Los Angeles-San Diego-Phoenix service.

Western at that time held a certificate authorizing operations over a circular route extending from San Diego to Los Angeles via El Centro, Yuma, Palm Springs, San Bernardino and Long Beach (Route No. 13).[6] However, Western had operated this route largely as if it were two separate routes, conducting operations between Los Angeles-Palm Springs, and between Los Angeles and Yuma via San Diego and El Centro, usually on flights originating north of Los Angeles on other routes operated by Western.

Western began service to El Centro in January, 1946, with two round trips daily to Los Angeles, which was reduced a year later to one round trip daily and shortly thereafter to three round trips per week. Service was inaugurated to Yuma in May, 1947, with only three

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[5] Subsequently merged into Frontier Airlines, Inc. Frontier is a local air service carrier whose operations extend north and south through the States of Arizona, New Mexico, Colorado, Utah, and Wyoming. Its routes also touch points in Western Texas and Southern Montana. One of its predecessors, Arizona Airways, was certificated to operate between Phoenix and Yuma. However, approval of the merger of Arizona and Frontier was granted by the Board only on condition that operations not be commenced over the Phoenix-Yuma segment. (Pet. Appendix 26).

[6] Route No. 13 also extended from Los Angeles to Salt Lake City via various intermediate points. Western was authorized to serve El Centro on Route No. 13 in 1943, and Yuma in 1946.

round trips a week. Service to El Centro and Yuma was increased from a thrice weekly frequency to twice daily only after Western was placed on notice that the Board might suspend its authorization to serve these points and thus adversely affect Western's plan for extension of its route to Phoenix.[7] (Pet. Appendix 17.)

In July, 1948, Western filed an application with the Board for approval of an agrement with Arizona Airways, Inc. to transfer the San Diego-El Centro-Yuma segment to the latter air carrier, and in March, 1949, filed an application to suspend its service over the segment pending inauguration of service by Arizona Airways between Yuma and Phoenix. These applications were withdrawn in July, 1949, when Western filed an application to extend Route No. 13 from Yuma to Phoenix.[8]

After full public hearings in the consolidated proceedings, the Examiner on August 17, 1951, issued his report recommending, *inter alia,* that local air service be provided between San Diego and Phoenix via El Centro, Yuma, and Ajo, and that Western be selected as the carrier to provide such service. Exceptions thereto with supporting briefs were filed and oral argument thereon held before the Board.

On January 17, 1952, the Board issued its opinion

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[7] The Examiner found that the type of service Western provided the cities during 1947-1949 clearly did not meet the minimum requirements for adequate service.

[8] The history of Western's service to El Centro and Yuma is set forth in detail at pp. 22-24 of the Appendix to the Board's opinion (Pet. Appendix 56-59).

and order. The Board found that the public convenience and necessity required local air service between Los Angeles, San Diego and Phoenix by the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, El Centro, Yuma, Ajo and Blythe. The Board further found that there is insufficient traffic potential at any of the points to justify service by more than a single carrier. In considering whether Western, a trunkline carrier, or one of the two local service applicants (Bonanza and Southwest) should be selected, the Board reviewed its established policy of favoring the award of local air service routes to local air service operators rather than trunkline air carriers (Pet. Appendix 12-13).[9] The Board concluded that there was no basis for any change of this policy in the present circumstances. Moreover, the Board declared that "the history of Western's service to El Centro and Yuma is such as to warrant an adverse conclusion as to the Western's willingness to operate a truly local service route" (Pet. Appendix 12).

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[9] The Board has heretofore stated with respect to local or "feeder" services, "we do not believe that in the present development and experimental stage of this type of service it should be entrusted to a carrier whose primary objectives are in providing trunkline service of a long-haul nature. In view of the limited traffic potentialities of the smaller cities to be served, an unusual effort will be required to develop the maximum traffic. Greater effort and the exercise of managerial ingenuity may be expected from an independent local operator whose continuation in the air transportation business will be dependent upon the successful development of traffic at these cities and the operation on an economical basis." *West Coast Case,* 6 C.A.B. 961, 981 (1946). cf. *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 184 F. 2d 545 (C.A. 9, 1950).

The Board pointed out that for Bonanza the points of El Centro and Yuma represent important traffic centers whereas to Western the record indicates that they were and are merely secondary points to which adequate service will be rendered only if some other purpose of the carrier is being served.[10] It concluded that the low priority accorded the needs of El Centro and Yuma by Western in the past stemmed from the fundamental economic fact that a business will ordinarily seek first to exploit areas of greater potential profit and that conversely in times of economic stress or operational difficulty, the least profitable points are apt to be the first to which service is curtailed. The Board declared that these factors supported the conclusion that El Centro and Yuma will, in the long run be better served by a local air carrier than by a trunk (Pet. Appendix 17).

The Board noted that even if Western could, as it contended, operate the required local air service at a lower cost to the government than either Bonanza or Southwest, this factor could not be decisive. For, if relative costs were the dominant criteria for the award of a new local air service, it would put an end to the policy of favoring independent local service carriers to operate local service routes (Pet. Appendix 9-13).[11]

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[10] The Examiner had found that this primary interest was an unrestricted San Diego-Phoenix route (Pet. Appendix 58).

[11] In addition, the Board found in the course of comparing Bonanza and Southwest that the award of the additional route miles to Bonanza would tend to lower its system unit operating costs and thus, to improve that air carrier's economic position. The government would in turn realize a saving in mail pay support for Bonanza's current route. (Pet. Appendix 15 and 16)

Similarly, the Board declined to regard as controlling the conclusion that Western could offer more through service to the communities on the local service route than either of the other applicants. Here too, it pointed out that a trunkline carrier applicant would almost always succeed to a local service route rather than an independent local service carrier if this criterion were adopted. (Pet. Appendix 13).

The Board concluded that in the light of its policies with respect to the operation of local air service routes, and with relation to its responsibilities for the encouragement and development of a self-sufficient and adequate air transportation system, a local service air carrier should be selected to operate the required local air service and Bonanza should be selected in preference to Southwest.[12]

STATUTES AND REGULATIONS INVOLVED

Western has either quoted in its brief or set forth as an Appendix thereto a majority of the provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U.S.C. 401 *et seq.* (hereinafter sometimes referred to as the Act), to which references are made herein. Other provisions of the Civil Aeronautics Act are cited or quoted in their appropriate place in the text of this brief.

QUESTIONS PRESENTED

Section 401(h) of the Civil Aeronautics Act gives the Board authority upon its own initiative and after

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[12] The Board made comparative findings between Bonanza and Southwest (Pet. Appendix 13-16), but the selection of Bonanza over Southwest is not at issue.

notice and hearing to "alter, amend, modify, or suspend" a certificate of public convenience and necessity "in whole or in part, if the public convenience and necessity so require".

The questions presented are:

1. Whether the Board had authority under section 401(h) to suspend Western's certificate for Route No. 13 in part, and for a temporary period, on findings that (a) the public convenience and necessity required a local type air service at the suspended points (b) the public convenience and necessity required such service to be rendered by an independent local service carrier, Bonanza, rather than by the trunkline carrier Western, and (c) the traffic available at the suspended points would not support both a trunkline service by Western and a local air service by Bonanza.

2. Whether an objection to an order of the Board may be considered by the Court where it was not urged before the Board.

3. If the answer to the above question is in the affirmative, the further question is presented whether the suspension of Western's authority to serve El Centro and Yuma involves a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

I.

Section 401(h) of the Civil Aeronautics Act gives the Board authority upon its own initiative and after

notice and hearing to (1) alter, amend, modify, or suspend a certificate, in whole or in part, if the public convenience and necessity so require, or (2) revoke a certificate in whole or in part for intentional failure to comply with any provision of Title IV of the Civil Aeronautics Act (Air Carrier Economic Regulation) or any order, rule, or regulation issued thereunder or any term, condition, or limitation of such certificate. The choice before the Board in this proceeding was not between "suspension" and "revocation", but between "suspension" and "alteration, amendment or modification". The latter power to alter, amend, or modify can be exercised to discontinue permanently an existing service where it does not work a basic transformation of the route. Suspension is a narrower power in the sense that no permanent change in the certificate authority is effected. Even an indefinite suspension may be ended at any time, and the certificate authority revived. This case was an appropriate one for a suspension, rather than an alteration of Western's certificate insofar as it authorizes service to El Centro and Yuma, because of the temporary nature of the Board's certification of Bonanza.

II.

The Board's action in temporarily suspending Western's service at El Centro and Yuma and certificating Bonanza was a lawful exercise of the Board's authority.

A. The Board's action in suspending Western's service was not a revocation of Western's certificate in dis-

guise. The Board did not use suspension as a device to accomplish revocation. The suspension was for a temporary period and any extension is speculative. Even if the suspension were for an indefinite period, it would constitute a lawful exercise of the Board's suspension power, which does not depend upon the length of a suspension, but upon the continued existence of the factors of public convenience and necessity which bring it into play. Even if Western's contention that the suspension of the particular operating rights involved is intended to be permanent were correct, the effect would be an alteration or modification of Western's certificate, not a revocation.

B. The Board's action in suspending Western and certificating Bonanza met the standard of public convenience and necessity imposed by section 401. This standard is defined in section 2 of the Act, and looks toward the development of a sound air transport system properly adapted to the needs of the commerce of the United States, the Postal Service and the national defense. The Board in applying the standard of public convenience and necessity in this case found a need for a local type air service between Poenix and the West Coast serving El Centro and Yuma, and found that Bonanza should supply the service. This was a proper application of the standard of public convenience and necessity. Consequently, the Board under section 401 could properly suspend Western and certificate Bonanza.

Western argues against this natural and logical application of section 401 by contending that it would

thwart the purpose of the Civil Aeronautics Act to insure stability of air transportation through permanency of certificates, and that suspension must be limited to cases where there is no need for any service. Such a narrow interpretation would improperly limit the Board in applying the standard of public convenience and necessity under section 401. The power to alter is essential to proper regulation, especially in a subsidized industry, and contributes to the development of a sound air transport system since service not required by the public convenience and necessity should be discontinued, and service so required should be instituted. Where, as here, no ultimate decisions have been reached, suspension rather than alteration was appropriate.

Western's contention also is predicated upon an erroneous assumption that the power asserted by the Board will be used arbitrarily to upset the stability of airline operations. Application of the standard of public convenience and necessity by the Board can never be arbitrary and is always subject to court review.

III.

The suspension of Western's authority to serve El Centro and Yuma is not subject to attack on constitutional grounds. Western did not raise a constitutional issue before the Board, and is therefore barred by section 1006(e) of the Civil Aeronautics Act from raising it on judicial review. In any event, the suspension of part of Western's certificate was not a "taking" of Western's property. Section 401(j) of the

Civil Aeronautics Act provides that no certificate shall confer any property right in the use of air space. Moreover, Western took its certificate subject to the power reserved to the Board in section 401(h) of the Act to alter or suspend that right. Also, there has been no "taking" for public use, but merely the exercise of a regulatory power over interstate commerce. Finally, Western has not established and cannot establish that it will incur any loss whatsoever in any of the three categories it lists.

ARGUMENT

I.

The Civil Aeronautics Act Gives the Board Authority Upon Its Own Initiative and After Notice and Hearing, to Discontinue Existing Carrier Service Where the Public Convenience and Necessity So Require

Section 401(h) of the Civil Aeronautics Act gives the Board authority, upon its own initiative, and after notice and hearing, to discontinue existing carrier service in whole or in part. This section reads as follows:

> *Authority to Modify, Suspend, or Revoke*
>
> The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate

> shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

The statute thus provides for two separate areas of Board authority with respect to existing certificates. One area of authority is the power to revoke existing certificates, in whole or in part, for violations of the Act, or Board regulations or orders. The other area of Board authority is the power to alter, amend, modify, or suspend existing certificates, in whole or in part, where the public convenience and necessity so require.[13]

The Board in various proceedings has drawn the line of demarcation between these areas of authority and their appropriate uses. Revocation is a permanent withdrawal of a certificate right by the Board. It is a punitive action for wilful violations, and the Board

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[13] Western's brief treats section 401(h) as if it provided only for suspension or revocation of existing certificates. This treatment is necessary to its erroneous contention that the Board, under the guise of suspension, has revoked its certificate to serve El Centro and Yuma.

was given power to take such action as an added sanction in the enforcement of the Act.[14] The Board has never had occasion to impose such a drastic sanction, particularly since other sanctions are available to the Board which, if imposed, do not result in the termination, through revocation of the certificate, of a service required by the public convenience and necessity.

On the other hand, the power given to the Board by section 401(h) of the Civil Aeronautics Act to alter, amend, modify, or suspend existing certificates is not punitive in character, but depends for its exercise upon the requirements of the public convenience and necessity, the same standard under which the Board may grant certificate rights under section 401(d) of the Act, and this standard is spelled out for both sections 401(d) and 401(h) in section 2.[15]

The power to alter, amend, or modify contemplates permanent changes in existing certificates either by way of a grant of authority to serve an additional point or points, or by changing the terms of the certificate so as to eliminate or restrict authority to serve a point or points.[16] The Board has held that such changes must be of a nature which do not work a basic transformation in the character of a route.[17] The use of this

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[14] *All American Airways Suspension Case,* 10 C.A.B. 24 (1949).

[15] The Board may revoke for cause even though the public convenience and necessity require the service. *All American Airways Suspension Case, supra.*

[16] *Panagra Terminal Investigation,* 4 C.A.B. 670 (1944); *Carribbean Area Case,* 9 C.A.B. 534 (1948).

[17] *Ibid.*

power becomes appropriate where there are present factors of the public convenience and necessity which require a permanent change in the authorizations of an existing certificate. For example, in the *Carribbean Area Case, supra,* the Board, on petition of Caribbean Atlantic Airlines, Inc., restricted the existing certificate right of Pan American World Airways, Inc., to serve St. Thomas to through flights in order to protect the local traffic of Caribbean-Atlantic which had been established as a local air carrier to serve the United States Caribbean possessions.[18]

The power to suspend depends upon the same factors of the public convenience and necessity as does the power to alter, amend, or modify. However, its appropriate use is in a situation where a permanent change in a certificate is not required. It connotes the continued legal existence of the certificate right and the possibility that the public convenience and necessity factors giving rise to the suspension may come to an end so that the service can be restored. The exercise of the power of suspension has been held to be appropriate in a number of cases decided by the Board.[19]

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[18] The Board expressed the opinion that the power to alter, amend, or modify a certificate, carries with it the right to impair the authority under such certificate either by completely eliminating a point or by imposing a condition which results in restricting the service that may be rendered (p. 546).

[19] *All American Airways, Suspension case,* 10 C.A.B. 24; *Wisconsin Central Renewal Case,* decided December 13, 1951, Order Serial No. E-5951; *Pioneer Certificate Renewal Case,* decided September 1, 1950, Order Serial No. E-4585; *Southwest Renewal-*

Section 401(h) thus provides a harmonious scheme of regulation with respect to existing certificate rights which affords those rights all the protection needed to provide a reasonable degree of security for the development of air transportation while at the same time recognizing the obvious need for some flexibility in the route pattern of an industry characterized by continuous and relatively rapid change.

Western in its brief has conceded, as it apparently felt it must in the face of the plain words of section 401(h), that the Board has the statutory power to suspend a certificate upon its own initiative (Pet. Br. 35) and that such suspension may be for an indefinite period (Pet. Br. 36). Once it is conceded that the power to suspend exists at all, we submit that it must also be conceded that the extent of the power cannot be limited or defined by the wishes of Western or even of the Board, but by the statute itself. The statute permits the Board to suspend only where the public convenience and necessity so require. This is the true and only test.

The real question is, therefore, did the Board in this case exercise its power to suspend in accordance with the statutory standard, i.e., the requirements of public convenience and necessity. This question is considered in Point II.

United Suspension Case, decided January 29, 1952, Order Serial No. E-6063; *North Central Route Investigation Case,* decided December 13, 1951, Order Serial No. E-5952; *Frontier Renewal Case,* decided September 14, 1951, Order Serial No. E-5702.

II.

The Board's Action in Suspending Western's Certificate to Serve El Centro and Yuma for a Temporary Period and Certificating Bonanza to Serve Such Points During That Period Represented a Lawful Exercise of the Board's Authority Under Section 401 of the Civil Aeronautics Act.

A. The Board's Action Was a Suspension and Not a Revocation of Western's Certificate Authority.

Western relies in large measure on the contention that the Board's action in suspending Western's service at El Centro and Yuma was in fact a revocation of Western's authority to serve such points and that there has been no default calling into play the Board's power to revoke. This contention is premised on the conclusion that facts show the local air service carriers are here to stay so that it can be anticipated the suspension will be continued indefinitely or made permanent and that the Board has carefully used suspension as a device to accomplish a revocation it could not otherwise have ordered.

The use by the Board of the suspension power in discontinuing Western's authority to serve El Centro and Yuma was not, as Western's brief implies, a device by the Board to avoid the use of the revocation power for which there was no statutory occasion. The alternatives before the Board were not "suspension" or "revocation" of part of Western's certificate.[20] The alternatives were "suspension" of such certificate on the one hand, or on the other hand the "alteration,

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[20] The distinction between a suspension power and a revocation or cancellation power has been recognized by the Courts. *Martinka* v. *Hoffmann,* 214 Minn. 346, 9 N.W. 2d 13, 17 (1943); *Elliott* v. *Farmers Mutual Fire Ins. Ass'n. of Black Hawk County,* 233 Iowa 766, 10 N.W. 2d 556 (1943).

amendment, or modification'' of such certificate, both of which rest upon the requirements of the public convenience and necessity. By use of the latter the Board could have ended Western's authority to serve El Centro and Yuma on a permanent basis just as effectively as if such authority were revoked. In an appropriate situation in which the public convenience and necessity required such a permanent alteration of Western's certificate for Route No. 13, this action could be taken, as it clearly would not result in a basic transformation of that route.[21] However, the situation was not appropriate for the permanent alteration of Western's certificate. The needed local air service between Phoenix and the West Coast via El Centro and Yuma was to be provided by a carrier with a temporary certificate (as are the certificates of all local air service carriers). The public conveneince and necessity did not therefore require the permanent discontinuance of Western service by way of the alteration of Western's certificate. The Board took the only appropriate course under section 401(h).[22]

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[21] El Centro and Yuma are only two out of ten points on the route which extends all the way to Salt Lake City. In addition, the two points are but a minor part of the Western-Inland Airlines system of total operations running between Seattle and San Diego and between Los Angeles and Lethbridge, Canada and Minneapolis. (Western owns approximately 99% of Inland's stock and, pursuant to Board approval, proposes to merge the two carriers on April 10, 1952).

[22] An alteration or modification of Western's certificate by the elimination of El Centro and Yuma therefrom would have permanently restricted Western from serving those points even though the Board might subsequently not renew Bonanza's temporary certificate or the factors supporting the Board action might come to an end.

To support its position that the Board has in effect revoked a part of its certificate, Western has been forced to fall back upon speculation as to what future Board action will be. Such speculation cannot serve as a basis for rendering invalid the present temporary suspension. The Board fully recognizes that the temporary certificate of Bonanza may well be renewed. The Board has many times expressed its hope and confidence in the success of the local air service experiment and it would not likely have provided a service which it thought would so soon come to an end.[23] However, it must be equally recognized that the success of any particular local service air carrier and the extension of its authority cannot now be accepted as either a legal fact or a foregone conclusion. This is particularly true with respect to an indefinite extension or a series of extensions producing that effect.

The Board in the past has terminated entirely a local service operation where the public convenience and necessity did not warrant its continuance.[24] In many cases where a temporary local service operation has been extended beyond its original expiration date, the Board has made adjustments in its service pattern by changing some of the points to be served.[25] The entire local air service development is still in an early

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[23] Generally speaking, as a group the local service air carriers, although they have by no means attained economic self-sufficiency, have made substantial progress in that direction.

[24] *Florida Airways Certificate Extension,* 10 C.A.B. 93 (1949).

[25] *Wisconsin Central Renewal Case,* supra, *West Coast Renewal Case,* decided March 13, 1952, Order Serial No. E-6220. In this latter case the Board declined to renew the local carrier at certain points leaving only trunk line service.

and experimental stage. It has already undergone many revisions from the original "feeder" concept, which formed the basis of the first operations authorized in 1946. The ultimate stage of this development is clearly not now known. New technical developments could change the direction of the experiment just as they have produced a drastic revision in the pattern of trunkline operations and service in the few years since 1945.[26]

While it may reasonably be assumed that El Centro and Yuma will receive some air service for an indefinite period, it cannot be assumed that such service will be rendered by Bonanza rather than Western or that it will always be a part of the route structure provided in this case. The present validity of Board action cannot turn on a judgment of the unknown. Western is amply protected against future improper action by its right to a full administrative hearing before an extension of the present suspension can be ordered, and the right of court review of any Board order entered after such hearing.

Even if it be conceded *arguendo* that Western's suspension will continue indefinitely, such fact would not render the suspension an improper use of the Board's authority under section 401(h). An indefinite suspension is neither in legal concept nor in fact the equivalent of a permanent suspension or a revocation. It has previously been demonstrated that suspension and revocation are not the same. A revocation is a perma-

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[26] Postwar long-range aircraft made technically possible for the first time transcontinental nonstop and other similar services which has produced many changes.

nent withdrawal of an operating authority by the Board. It can never be revived, but could only be given anew after application and hearing under the standards of section 401(d). Suspension, even of an indefinite character, on the other hand is not a final and permanent determination of a right. The right continues in existence to be revived when, and if, the factors of the public convenience and necessity giving rise to the suspension no longer pertain.

Section 401(h) does not impose any limitation on the Board's authority to suspend based on the length of the suspension. The length of a suspension under the statute is, as Western concedes,[27] coterminous with the existence of the public convenience and necessity factors which require its imposition. Such factors are clearly of an indefinite nature in many cases. Consequently, to determine the validity of a suspension on the question of its length in effect would be to say that a particular suspension must come to an end mechanically at a given time even though the public convenience and necessity require its continuance. Such a construction would rewrite the statute.[28]

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[27] Western states with respect to the circumstances under which it believes suspension to be proper that the propriety of the application of section 401(h) is not affected by the existence of a condition requiring an indefinite suspension which by the passage of time might prove to be permanent (Pet. Br. 36).

[28] The Board had occasion to consider the question of the length of a suspension under section 401(h) in *All American Airways, Suspension Case, supra,* where it said (10 C.A.B. at p. 35):

> The exact time at which we should order the suspension to be ended cannot and need not be specified at this time. The determination that the public convenience and necessity re-

B. The Board's Suspension of Western's Certificate Authority and the Certification of Bonanza Met the Standards Imposed by Section 401.

Section 401(h) of the Civil Aeronautics Act provides that the Board may suspend an existing certificate, in whole or in part, where the public conveneince and necessity so require. This is the same standard provided for the certification of a carrier under section 401(d) of the Act. Consequently, both the suspension of Western and the certification of Bonanza were governed by the application of this test of the requirements of the public convenience and necessity.

The determination of the meaning of this standard is not left to the whim or the caprice of the Board. The

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quire suspension is based on facts which are subject to change. The lapse of a substantial period of time may bring substantial changes in the factors appropriate to this proceeding and in the weight which the Board accords to them. Although less probable, the lapse of even a short period of time may indicate new or changed factual conditions which affect the need for suspension. Nevertheless, we have no present indication as to when these changes might take place. Thus it does not seeu possible to forecast accurately the date on which the suspension of all or part of the certificate is no longer required by the public convenience and necessity. The suspension should continue as long as the factors presently requiring such suspension remain substantially unchanged, and should be terminated whenever it is demonstrated to the Board that circumstances have changed in such manner that suspension of all or part of the certificate is no longer required by the public convenience and necessity. Therefore we shall leave that decision to the procedures which may be invoked in the future by the interested parties.

* * * * * *

"It has been contended that, while the Board clearly has the authority to suspend a certificate for a reasonable period of time if required by the public convenience and necessity,

standard appears in almost all public utility statutes and has a long history of judicial and administrative application. In addition, section 2 of the Civil Aeronautics Act [29] specifically provides that the Board shall consider a number of things as in accordance with the public convenience and necessity. These standards, which Western describes as "clear and compelling," [30] look toward the encouragement and development of a sound air transport system properly adapted to the needs of the commerce of the United States, the Postal Service, and the national defense.[31]

The Board in applying the standards of section 2 in

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the suspension of the certificate for an indefinite or unreasonable period of time would be tantamount to a revocation. While we do not feel required to define the length of time for which a certificate may be suspended before it becomes a revocation, it would not appear to us that the length of time alone is controlling. We recognize that there is a possible abuse of discretion in an administrative agency in attempting to discipline a carrier by suspending its certificate on the basis of facts which would not justify a revocation. However, it seems apparent that where the record developed after extensive hearing clearly indicates that the public convenience no longer require a service, such substantive test is sufficient to prevent any abuse, particularly where procedures remain open, as they do here, whereby interested parties may seek termination of the suspension by the Board.

[29] Section 2 is set forth in full at page 31 of Western's brief.

[30] Pet. Br. 30.

[31] In *Northwest Air Duluth Twin Cities Operation,* 1 C.A.B. 578 (1940), the Board pointed out with respect to the standards of section 2, that while Congress thereby intended the Board to exercise a firm control over the expansion of air transportation, "it was not the Congressional intent that the air transportation system of the country should be 'frozen' to its present status."

this case found a public need for a type of local air service which would provide air transportation from each of the intermediate points to and from the large city terminals and between the intermediate points. Such a service is of the type provided under temporary certificates by some 17 local service carriers now operating in various areas of the United States. It is subject to restrictions in the certificate which insure a local type of service.[32] Such service is designed to fill the purely local need for air transportation in a given area. It differs markedly from a trunkline type of service,

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[32] The certificate issued to Bonanza in this case contained in paragraphs (1), (3), (4) of its terms, conditions and limitations the following restrictions: (Pet. Appendix 64, 65)

> "(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points."
>
> * * * * * *
>
> "(3) On each trip operated by the holder over all or part of one of the two route segments in this certificate, as amended, the holder shall stop at each point named between the point of origin and point of termination of such trip on such segment, except a point or points with respect to which (1) the Board, pursuant to such procedure as the Board may from time to time prescribe, may by order relieve the holder from the requirements of such condition, (2) the holder is authorized by the Board to suspend service, or (3) the holder is unable to render service on such trip because of adverse weather conditions or other conditions which the holder could not reasonably have been expected to foresee or control."
>
> * * * * * *
>
> "(4) Each trip scheduled between the co-terminal points Los Angeles and Long Beoch, Calf., on the one hand and the intermediate point San Diego, Calif., on the other shall originate or terminate at Phoenix, Ariz."

which does not operate subject to the certificate restrictions imposed on local service carriers, and which is free to be operated and is normally operated in a manner so as to provide nonstop long-haul service between terminals or terminal-to-terminal service stopping at only some intermediate points on particular flights.

This differentiation of types of service is a classification that the Board is entitled to make in determining the public convenience and necessity. Section 416(a) of the Civil Aeronautics Act recognizes that there may be differences in types of air service and carriers. This section reads as follows:

> The Authority [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the service performed by such air carrier shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority finds necessary in the public interest.

To the same end is the provision of section 401(f) which authorizes the Board to impose upon certificates issued under section 401(d) "such reasonable terms, conditions, and limitations as the public interest may require."

The Board has consistently distinguished between trunkline type of service and local air service as an element of the public convenience and necessity in granting certificates under section 401(d) to independent local operators for local air service rather than to

trunkline operators. Western has made no contention that the Board is powerless to distinguish between trunkline service and local air service in determining public convenience and necessity; nor can it be seen how such a contention could be made. Since Western concedes that the Board has a suspension power based on the public convenience and necessity, it would clearly seem to follow that section 401 of the Civil Aeronautics Act permitted the Board to determine, if the facts supported such a finding, that the public convenience and necessity required a local air service between Phoenix and the West Coast and that the service should be operated by Bonanza, a local air carrier, and not by Western, a trunkline carrier.

The Board's reasons for the choice of Bonanza over Western to operate the local air service between Phoenix and Los Angeles are fully set forth in the counterstatement in this brief.[33] They fall into two main categories:

First, it is the Board's general policy that local air services be operated by local air carriers rather than trunkline carriers. The principal rationale behind this policy is the belief that local operators have a greater incentive to develop the local air service market, which primarily serves smaller communities, than do trunkline carriers whose primary business interest is in their large terminal-to-terminal service. For example, it would be beyond reason to expect Western to be as fully interested in service to El Centro and Yuma as

[33] It is undisputed that the traffic at El Centro and Yuma or the other points involved would not support two carriers.

between Los Angeles and San Francisco. This is a reasonable policy that bears an obvious relationship to the standards of section 2 of the Act directed to the development of an air transport system, properly adapted to the needs of the commerce, the Postal Service, and the national defense of the country.

Second, this policy is supported and reinforced in this case by the past history of Western's operations at El Centro and Yuma. Western emphasizes its interest for a decade in the area involved. However, the record shows that the thrust of Western's interest over the years was to obtain a trunkline routeto Phoenix, that it had no real interest in local service at El Centro and Yuma. It reduced service to those points below the point of adequacy and at one time virtually abandoned the points.[34] Western only revived interest again in El Centro and Yuma in connection with a further effort to get to Phoenix. This revival was described by the Examiner in a finding adopted by the Board, as follows (Pet. Appendix, 57 and 58):

> . . . This belated enthusiasm appears to have resulted from three factors, none of which involved fulfilling its duty to provide these cities with the service needed. First, Western feared competition from Southwest on its Los Angeles-San Diego segment; second, the authorization of Southwest to provide a San Diego-Phoenix service rekindled

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[34] It has been pointed out in the counterstatement that in 1948 Western tried to transfer its certificate right to Arizona Airways and that in 1949 it proposed to suspend service at El Centro and Yuma altogether.

Western's ambitions and hopes for a San Diego-Phoenix route; and third, Western feared that it might be suspended at San Bernardino and Palm Springs as well as at El Centro and Yuma. Consequently, Western decided to establish more frequent schedules to the points proposed for suspension. Although Western presented no affirmative case to show that additional San Diego-Phoenix terminal-to-terminal service was needed and consented to accept a restriction on its San Diego-Phoenix operation inhibiting effective competition for San Diego-Phoenix and Los Angeles-Phoenix traffic, Western's protestations are not convincing. Based on Western's previous record it would appear that its primary interest in this proceeding is to obtain an unrestricted San Diego-Phoenix route and to use the local service operation as a "stepping stone" or "hat in the door" method of accomplishing this result. It can easily be anticipated that in the event this aim is achieved in this proceeding Western will return to the Board in a short time with an application requesting the lifting of the local service restriction and a story that unless supported by terminal-to-terminal traffic the El Centro-Yuma-Ajo segment will never be economically justified. Based on the record to date Western appears to be a very "reluctant dragon" when it comes to service to El Centro, Yuma, and Ajo.

In sum, it was lawful and proper for the Board in this case to base the partial suspension of Western's

certificate and the certification of Bonanza upon the requirements of the public convenience and necessity as reflected in the need for local air service, the insufficiency of traffic to support more than one type of service, and the conclusion that Bonanza would better fulfill the public need.

Western contends that the Civil Aeronautics Act permits suspension only in cases where no service at all is required any longer because of drastic economic upheavals. This narrow interpretation of section 401(h) is directly contrary to that made by the United States Court of Appeals for the District of Columbia.[35] In 1947, Pan American-Grace Airways, Inc. (Panagra) asked the Board to suspend the entire certificate of its competitor, Braniff Airways, Inc. (Braniff) to operate between the United States and Buenos Aires for a period of 5 years or to alter, amend, or modify the certificate by striking out points south of Balboa. The request was based on economic and competitive considerations. The Board declined to take action. On appeal, the Court quoted section 401(h) and declared: (p. 36)

> It is clear from this provision that the Board had the power, after notice and hearing, to grant Panagra's petition and to suspend Braniff's certificate, subject to the President's approval.

If 401(h) gave the Board power to suspend Braniff's whole South American operation for a period of 5

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[35] *Pan American-Grace Airways* v. *Civil Aeronautics Board,* 178 F. 2d 34 (C.A. D.C. (1948)).

years for competitive reasons, it certainly gives the Board power to suspend two points on Western's Route No. 13 for the period and reasons here involved.

The necessary effect of Western's argument is a substantial limitation upon the standard of public convenience and necessity as it appears in section 401(h). It would preclude the Board, for example, from discontinuing service by one of two carriers serving a point or substituting service at a point or points even though there was present the clearest economic necessity for such action or even if it was required by the national defense, one of the cornerstones of public convenience and necessity under section 2 of the Act.

Western justifies its proposed construction of section 401(h) by the argument that otherwise the basic purposes of the Civil Aeronautics Act to insure stability of routes and security of investment would be upset. The Board's action in this case is not only in nowise inconsistent with the purposes of the Civil Aeronautics Act but contributes to the achievement of those purposes. These basic purposes are set forth in section 2 of the Act. Nowhere in that section does one find mention of a vested right through the grant of a certificate. The whole emphasis is to the contrary and looks toward the development of a sound air transport system and the fostering of sound economic conditions through proper regulation by the administrative agency.

One element of such regulation is the protection accorded certificates by the grant of power to the Board to control competition by issuing certificates only where justified by the public convenience and necessity. It was with this protection that Congress was pri-

marily concerned in the enactment of the Civil Aeronautics Act. That statute came into being in response to threats of cut-throat competition and was primarily designed to substitute therefor a concept of regulated competiion. A corollary to this protection is the power of the Board to alter, amend, modify, or suspend where the public convenience and necessity so require. Such power contributes to a sound air transport system. The fears of Western that the stability of the industry will be destroyed seem somewhat exaggerated in view of the fact that, despite the existence of the power in the Board to alter, amend, modify, or suspend, it is common knowledge that the stability and strength of the individual air carriers and the air transportation industry as a whole have increased tremendously since passage of the Civil Aeronautics Act in 1938.[36]

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[36] Pan American expressed similar fears in the *Caribbean Area Case, supra,* and the Board answered the carrier in these words at p. 550:

> The fears of Pan American that the power to diminish authority under a certificate would make all carriers insecure in their rights and tend to destroy the stability of the air transport system are unjustified and cannot serve to change the conclusions that have been reached. We are fully aware of the necessity of maintaining stability in the air transport industry if the objectives of the Act are to be accomplished, and agree that at least one purpose in providing for certificates of public convenience and necessity as a method of control was to bring about such stability. In practice, this purpose has been realized. For example, every airline is protected from competition other than that authorized is accordance with the substantive rules and procedural requirements specified by Congress. Apart from this, the provision for mail compensation based on the need of the carrier has given to the airlines a stabilizing factor and a means of security not enjoyed by either rail or motor carriers.

In cases like the present the power conferred by section 401(h) makes it possible for the Board to insure the kind of service needed and the development of the service by a carrier devoted wholeheartedly to that end.

The Board pointed out in the *Caribbean Area Case,* 9 C.A.B. 534 (1948), that a narrow construction of section 401(h) would be wholly inconsistent with the basic objectives of the Civil Aeronautics Act and would make the private interests of the units comprising the air transport system paramount to the public welfare (pp. 548-549):

> . . . Under such an interpretation, the Board's appraisal of the factors set forth by Congress as its guide, once made and given expression in a certificate, would become irrevocable, notwithstanding subsequent changes in the facts upon which the Board's judgment was based that might turn once sound action into an instrument for thwarting the policy of the Act. There would be substituted for a transportation pattern, keyed to the public need, a route structure, in important respects dependent upon the will of the individual carriers and subject to change, no matter how

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But nothing in the Act indicates that this security and stability was an end to be sought at any price and without regard to the consequences. On the contrary, there can be no doubt that in conferring upon air carriers the benefits of the Act, Congress likewise imposed obligations for the good of the public, and intended that, where conflicts between private and public interests occurred, the private interests of the certificate holder should yield to the broader interests of the public as embodied in the concept of public convenience and necessity.

urgent the public need for such change, only with the consent of those carriers.

The consequences that might flow from the restrictive interpretation of section 401(h) that has been urged by Pan American are forcefully demonstrated in other ways. For example, a small carrier, operating a needed but economically weak route, could be driven to even direr financial straits by the competition of a more powerful rival for traffic at a point which, though relatively unimportant in the over-all operations of the larger carrier, constituted a major source of revenue for the smaller line, while the Board sat idly by, impotent to take the only action that under the circumstances would serve to accomplish the objectives of the Act. In such a situation, the Board might well be faced with the equally unsatisfactory alternatives of permitting the small carrier to be forced into insolvency or of maintaining its ability to operate the required services by means of steadily increasing Government subsidy in the form of mail pay. And this situation could occur with respect to a point or points which, if served by the small carrier alone, would supply sufficient revenues to permit it to secure financial strength, and possibly complete self-sufficiency. We do not believe that Congress intended any such results.

The benefits of sound regulation would be denied by the construction advanced by Western and there would be substituted therefor a rigid and frozen air transport system supported by Federal subsidy. Such a result is

contrary, not only to the statute, but to the needs of air transportation which is non-rigid and ever changing.

Western in large part predicates its contention that the suspension power will destroy the stability of the industry, unless narrowly circumscribed, on an assumption of capricious and arbitrary application thereof by the Board. However, such an assumption cannot be made. The Board must act in accordance with statutory standards and the courts have power to set aside any Board action not in conformance therewith.

III.

The Suspension of Western's Authority to Serve El Centro and Yuma Is Not Subject to Attack on Constitutional Grounds.

Western rather briefly, if not perfunctorily,[37] contends that the Board's suspension order is violative of the Fifth Amendment in that it involves a taking of Western's property without just compensation (Br. 37-40). We think that there are several answers which are dispositive of this contention on the merits, and they will be stated briefly *infra*. At the outset, however, petitioner is met with an insuperable statutory bar to raising the constitutional question here.

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[37] Western regards the other points it urges as conclusive, and presents the constitutional argument, "largely that it may not be deemed waived" (R. 37).

A. Western Did Not Raise the Constitutional Issue Before the Board, and Is Therefore Barred by Section 1006(e) of the Civil Aeronautics Act from Raising It on Judicial Review.

Section 1006(e) of the Civil Aeronautics Act reads as follows:

> "The findings of fact by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Section 1006(e) has regularly been applied, as its terms plainly require, to bar judicial review of issues not presented before the Board. *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board,* 183 F. 2d 975 (C.A. D.C. 1949); *New England Air Express* v. *Civil Aeronautics Board* (Case No. 11274, C.A. D.C., decided February 21, 1952).

No reasonable ground is suggested here for Western's failure to present its constitutional objection to the Board. The suspension order was not a surprise development; the suspension issue was argued both to the Examiner and to the Board. The purpose of section 1006(e) is, of course, to afford the administrative agency "an opportunity to consider on the merits questions to be argued upon review of its order." *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 256 (1943). Even constitutional questions will not be considered when they might have been, but were not, raised in the course of orderly ad-

ministrative process. *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (1947). That rule is fully applicable here.

B. In Any Event, the Suspension of Part of Western's Certificate Was Not a "taking" of Western's Property.

The constitutional contention must also fail on the merits. First, a certificate of public convenience and necessity is a grant limited by the terms of the enabling statute. One of the express provisions of that statute is that "No certificate shall confer any proprietary property, or exclusive right in the use of any air space, civil airway, loading area, or air-navigation locality" (Section 401(j), (49 U.S.C. 481(i)). Plainly, the taking of something which is not property cannot be the taking of property without just compensation within the meaning of the Fifth Amendment.

Second, even if it be assured, *arguendo,* that a certificate creates some kind of a property interest in the constitutional sense, the scope of the assumed interest is nevertheless to be found in the enabling act. *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419 (1951).[38] Section 401(h) of the Act specifically reserves to the Board the powers to suspend, alter or modify certificates. Petitioner, and all other holders of certificates of convenience and necessity acquired whatever rights they may possess subject to that reserved

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[38] And see *Chicago, I. & L. Ry. Co.* v. *United States,* 270 U.S. 287 (1926); *Detroit United Ry.* v. *City of Detroit,* 229 U.S. 39 (1913); *American Bond & Mortgage Co.* v. *United States,* 52 F. 2d 318 (C.A. 7, 1931) cert. denied 215 U.S. 538 (1932); *Trinity Methodist Church South* v. *Federal Radio Commission,* 62 F. 2d 850 (C.A. D.C., 1932).

power.[39] The suggestion that section 401(h) is itself unconstitutional (Pet. Br. 1) is not elaborated by petioner, and is plainly untenable.

Third, there has been no "taking" for public use, but the exercise of a regulatory power over commerce. The United States is not now proposing to "use" the part of Western's Route 13 for its own purposes. That portion of the route has been suspended, temporarily, but it has not ben retrieved by the Government or given to Bonanza. True, Bonanza will be allowed to serve Yuma and El Centro, but as a part of a different route, and a different kind of service (i.e., local rather than trunkline).

Finally, it is clear that Western has not made any showing that it will suffer a property loss. The losses which it asserts will flow from the suspension are (1) operation losses in developing service at Yuma and El Centro; (2) losses of future profits from service at the points; and (3) losses on its ground facilities at the points. Western has not established and cannot estab-

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[39] Even if the Act had not specifically reserved power in the Board to alter or suspend a certificate of convenience and necessity no constitutional question would be raised by a subsequent alteration of such a certificate pursuant to statute. One who acquires property in an area subject to the power of Congress to regulate interstate commerce does so "subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation". *Union Bridge Co.* v. *United States,* 204 U.S. 364, 400 (1907). As the Supreme Court said in *Knox* v. *Lee,* 12 Wall, 457, 550 (1870) referring to the just compensation requirement of the Fifth Amendment, "that provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." And see *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U.S. 467 (1911) and cases cited at pp. 480-484.

lish that it will incur any loss whatsoever in any of the three categories it lists.

Up to October 1, 1951, Western was a need carrier on a subsidy mail rate, which meant that it received compensation in the form of mail pay for route development expenses and operational losses incurred as a result of its operation to El Centro and Yuma under honest, economical, and efficient management.[40] Western clearly is not entitled to collect twice on this claim.

Petitioner cannot establish that it would have any profits from its El Centro and Yuma operation in the future. Its exhibits in the proceeding showed that on an allocated cost basis during 1949 Western incurred losses at both Yuma and El Centro.[41] For the 12 months period ending September 30, 1951, on an allocated cost basis Western would show an over-all profit of less than $100 at the two points. What the future will bring is a guess, but on past experience certainly not any substantial profits.

Petitioner has made no showing that it will incur any financial loss with respect to its ground facilities. In an inflationary period such as at present, such loss cannot be assumed. Moreover, Bonanza in its memorandum to this court on Wetsern's motion for a stay stated it was ready, willing, and able to utilize substantially all of Western's ground equipment and fa-

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[40] Between May 1, 1944 and October 1, 1951, Western received a total of $7,696,938 in mail pay, approximately half of which at least represented a subsidy.

[41] On an added cost basis there was a loss of approximately $18,500 at Yuma and a profit of $9,300 at El Centro.

cilities at El Centro and Yuma and to pay Western such reasonable sums as are required for the use or purchase of the equipment and facilities.

CONCLUSION

Upon the basis of the foregoing reasons and authorities, the Board's order should be affirmed.

Respectfully submitted,

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